NADARAJAH

v.

PP

HIGH COURT MALAYA, KUALA LUMPUR
AUGUSTINE PAUL J
[CRIMINAL REVISION NO: 43-13-2000]
25 AUGUST 2000

CONSTITUTIONAL LAW: *Attorney General - Power to institute proceedings - Discretion to institute prosecution in a certain court - Whether subject to judicial review - Federal Constitution, art. 145(3), (3A)*

CONSTITUTIONAL LAW: *Fundamental liberties - Equality before the law - Whether discretion to institute prosecution in certain court a violation of such liberty - Federal Constitution, art. 8(1)*

CRIMINAL PROCEDURE*: Jurisdiction of court - Sessions Court - Case ordinarily fell within jurisdiction of Magistrate's Court - Case registered in Sessions Court - Whether ultra vires Federal Constitution - Subordinate Courts Act 1948, ss. 63, 64, 85, 87*

CRIMINAL PROCEDURE*: Prosecution - Attorney General - Powers of - Discretion to institute prosecution in certain court - Whether subject to judicial review - Federal Constitution, art. 145(3), (3A)*

The accused was charged in the Sessions Court for an offence under the second limb of s. 506 of the Penal Code. When the case came up for continued hearing in the Sessions Court, counsel for the accused raised a preliminary objection. He argued that the prosecution of the accused in the Sessions Court was wrong in law as the case was one that was ordinarily within the jurisdiction of the Magistrate's Court – contending that it offended art. 8 of the Federal Constitution which referred to 'equality before the law'. The Sessions Court judge dismissed the objection on the ground that art. 145(3) of the Federal Constitution gave the Attorney General a discretion to choose the court in which to prosecute an offender and that consequently the act of registering a case that ordinarily fell within the jurisdiction of the Magistrate's Court in the Sessions Court was not *ultra vires* the Federal Constitution.

The issue for consideration was whether the Attorney General could institute a prosecution in the Sessions Court when it should ordinarily have been done in the Magistrate's Court.

Held:

[1a] All that 'equality before the law' requires is that the cases of all potential defendants to criminal charges shall be given unbiased consideration by the prosecuting authority and that decisions whether or not to prosecute in a particular case for a particular offence should not be dictated by some irrelevant consideration. Article 8(1) of the Federal Constitution does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is some difference in the circumstances of the offence that has been committed. The decision to identify the difference in the circumstances of a particular case and to act accordingly is that of the Attorney General pursuant to art. 145(3) of the Federal Constitution and is not subject to judicial review.

[1b] The exercise of the discretion by the Attorney General to institute a prosecution against a person in a certain court, dependent on the circumstances of the case, may itself amount to a reasonable classification for the purposes of art. 8(1) of the Federal Constitution.

[2] Article 145(3A) of the Federal Constitution was designed to authorise the passing of laws to confer power on the Attorney General to institute prosecutions in a court which he would otherwise be precluded from doing so.

[3] The provisions of the Subordinate Courts Act 1948 dealing with the jurisdiction of the Sessions Court and the Magistrate's Court indicate that the jurisdiction conferred on the Magistrate's Courts is not exclusive. It is subject to the overriding jurisdiction of the Sessions Court as recognised by s. 85 of the Subordinate Courts Act 1948. The result is that s. 85 of the Subordinate Courts Act 1948 does not oust the jurisdiction of the Sessions Court in respect of offences falling within the jurisdiction of the Magistrate's Court. The filing of the case in the Sessions Court therefore was correct in law.

[Institution of prosecution in Sessions Court lawful.]

Case(s) referred to:

Bank Negara Malaysia v. Gerald Glesphy & Ors [1992] 1 CLJ 15 ***(refd)***
Bhimsen v. State of UP AIR [1955] SC 435 ***(refd)***
Birakishore v. State of Orissa [1964] 7 SCR 32 ***(refd)***
Che Ani Itam v. PP [1984] 1 MLJ 113 ***(refd)***
Datuk Hj Harun Hj Idris v. PP [1977] 2 MLJ 155 ***(refd)***
Govindlalji v. State of Rajasthan [1964] 1 SCR 561 ***(refd)***
Johnson Tan Han Seng v. PP [1977] 2 MLJ 66 ***(refd)***
Kee Chai Heng v. Ketua Polis Daerah Kuala Muda [1999] 2 CLJ 664 ***(refd)***
Lachman v. State of Punjab AIR [1963] SC 222 ***(refd)***
Lee Heng Kooi v. PP [1993] 1 MLJ 69 ***(refd)***
Mittal v. Union of India AIR [1983] SC I ***(refd)***
Ong Ah Chuan v. PP [1981] 1 MLJ 64 ***(refd)***
PP v. Chang Han Yuan [1999] 4 CLJ 234 ***(refd)***
PP v. Dato' Yap Peng [1987] 2 MLJ 311 ***(refd)***
PP v. Datuk Harun Hj Idris & Ors [1976] 2 MLJ 116 ***(refd)***
PP v. Lau Kee Hoo [1983] 1 MLJ 157 ***(refd)***
PP v. Lim Shui Wang & Ors [1979] 1 MLJ 65 ***(refd)***
PP v. Su Liang Yu [1976] 2 MLJ 125 ***(refd)***
PP v. Tengku Hitam [1962] MLJ 414 ***(refd)***
Pyx Granite Co Ltd v. Ministry of Housing and Local Government & Ors [1959] 3 All ER 1 ***(refd)***
Ramkrishna Dalmia v. Tendolkar [1959] SCR 279 ***(refd)***
Repco Holdings Bhd v. PP [1997] 4 CLJ 740 ***(refd)***
Secretary of State v. Mask & Co AIR [1940] PC 105 ***(refd)***
Shree Meenakshi Mills Ltd v. AVV Sastri AIR [1954] SC 13 ***(refd)***
State of J & K v. Golam Md AIR [1967] SC 122 ***(refd)***
State of MP v. Rameshwar Rathod AIR [1990] SC 1849 ***(refd)***
State of West Bengal v. Anwar Ali AIR [1952] SC 75 ***(refd)***
Teh Cheng Poh v. PP [1979] 1 MLJ 50 ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 177, 418A
Federal Constitution, arts. 5(1), 8(1), 145(3), (3A)
Penal Code, ss. 392, 457, 506
Subordinate Courts Act, ss. 63, 64, 85, 87(1),(2)

For the applicant - Manjeet Singh Dhillon (R Tirukumaran with him); M/s Manjeet Singh Dhillon
For the respondent - Md Zaki Md Yassin DPP
For the complainant - Dr Cyrus Das (S Nantha Balan with him); M/s Shook Lin & Bok

Reported by Mariette Peters-Goh

JUDGMENT

Augustine Paul J:

The single and only issue for determination in this revision proceeding before me is whether the attorney general may institute a prosecution in the Sessions Court when it should ordinarily have been done so in the Magistrates' Court.

One Nadarajah ("the accused") was charged in the Sessions Court at Kuala Lumpur for an offence under the second limb of s. 506 of the Penal Code which carries a maximum of seven years imprisonment. When the case came up for continued hearing in the Sessions Court on 14 August 2000 learned counsel for the accused raised a preliminary objection. He argued that the prosecution of the accused in the Sessions Court is wrong in law as the case is one that is ordinarily within the jurisdiction of the Magistrates' Court. He said that this offends art. 8(1) of the Federal Constitution ("the constitution") in view of the higher sentence that a Sessions Court is empowered to impose. The learned Sessions Court judge dismissed the objection on the ground that art. 145(3) of the constitution gives the attorney general a discretion to choose the court in which to prosecute an offender and that consequently the act of registering a case that ordinarily falls within the jurisdiction of a Magistrate's Court in the Sessions Court was not *ultra vires* the constitution. The parties saw me in chambers and requested me to review the ruling. I agreed to do so as it is a matter that goes to the jurisdiction of the subordinate courts and is therefore of vital importance. I invited them to submit before me on 15 August 2000 which they did.

Learned counsel for the accused, Mr Manjeet Singh Dhillon, in his submission referred to ss. 63, 64, 85 and 87 of the Subordinate Courts Act 1948 ("the Act") which deal with the jurisdiction of the subordinate courts. With regard to his objection grounded on art. 8(1) of the constitution he first pointed out the differences in the sentencing powers of a Sessions and Magistrates' Court. It follows, he said, that there would be unequal treatment if two persons who had committed the offence under the second limb of s. 506 of the Penal Code are charged in different courts. In support of his argument he referred to *PP v. Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116 where Abdoolcader J (as he then was) in referring to *Shree Meenakshi Mills Ltd v. AVV Sastri* AIR [1954] SC 13 said at p. 118:

> Article 8(1) forbids the executive being authorised to pick and choose between alternative rules of procedure for application to persons falling under the same class.

He then referred to a plethora of cases to argue that the word "institute" in art. 145(3) of the constitution does not authorise the attorney general to pick the forum of his choice unless he has been statutorily allowed to do so. The learned deputy public prosecutor, Dato' Md Zaki bin Md Yassin, said that he is unable to find any specific provision of law in any statute which empowers the attorney general to institute a prosecution in a higher court when a lower court has the same jurisdiction. He then referred to art. 145(3A) of the constitution which provides for the enactment of such a law and added that no specific provision has yet been made. However, he said, judicial pronouncements in cases such as *Johnson Tan Han Seng v. PP* [1977] 2 MLJ 66, *Datuk Haji Harun bin Haji Idris v. PP* [1977] 2 MLJ 155, *Teh Cheng Poh v. PP* [1979] 1 MLJ 50 and *PP v. Lim Shui Wang & Ors* [1979] 1 MLJ 65 authorise the attorney general to institute a prosecution in the Sessions Court, as on the facts of this case, when it could have been done so in the Magistrates' Court. At my invitation Dato Dr Cyrus Das, counsel holding a watching brief for the complainant in the Sessions Court, also addressed me. He said that the fact that the choice of the forum conflicts with art. 8(1) of the constitution which found favour with Abdoolcader J (as he then was) in *PP v. Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116 was rejected by the Federal Court in *Datuk Haji Harun bin Haji Idris v. PP* [1977] 2 MLJ 155. In further support of his argument he referred to cases such as *Ong Ah Chuan v. PP* [1981] 1 MLJ 64, *Che Ani bin Itam v. PP* [1984] 1 MLJ 113 and *PP v. Lau Kee Hoo* [1983] 1 MLJ 157.

The first matter for consideration is whether the prosecution of a person in a higher court when he could have been charged in a lower court offends art. 8(1) of the constitution which reads as follows:

> All persons are equal before the law and entitled to the equal protection of the law.

The view expressed by Abdoolcader J (as he then was) in *PP v. Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116 loses its efficacy in view of its rejection soon after by Ajaib Singh J (as he then was) in *PP v. Su Liang Yu* [1976] 2 MLJ 125 and the stand taken by the Federal Court in *Datuk Haji Harun bin Haji Idris v. PP* [1977] 2 MLJ 155. In fact in *Johnson Tan Han Seng v. PP* [1977] 2 MLJ 66 Suffian LP in dealing with the relationship between art. 8(1) and art. 145(3) of the constitution said at p. 70:

> … I do not think that it can be said that it must be read subject to article 8. Rather, in my view, the contrary: article 8 it is that must be read subject to article 145(3).

In commenting on the Singapore equivalent of our art. 8(1) of the constitution Lord Diplock in delivering the advice of the Privy Council in *Ong Ah Chuan v. PP* [1981] 1 MLJ 64 said at p. 72:

> All criminal law involves the classification of individuals for the purposes of punishment, since it affects those individuals only in relation to whom there exists a defined set of circumstances – the conduct and, where relevant, the state of mind that constitute the ingredients of an offence. Equality before the law and equal protection of the law require that like should be compared with like. What Article 12(1) of the Constitution assures to the individual is the right to equal treatment with other individuals in similar circumstances. It prohibits laws which require that some individuals within a single class should be treated by way of punishment more harshly than others; it does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is some difference in the circumstances of the offence that has been committed.

And at p. 73:

> But Article 12(1) of the Constitution is not concerned with equal punitive treatment for equal moral blameworthiness; it is concerned with equal punitive treatment for similar legal guilt.

This view found favour with the Federal Court in *Che Ani bin Itam v. PP* [1984] 1 MLJ 113 and *PP v. Lau Kee Hoo* [1983] 1 MLJ 157. In answer to the problem posed by Mr Manjeet Singh Dhillon of different treatment for persons accused of having committed a similar offence I need only refer to *Johnson Tan Han Seng v. PP* [1977] 2 MLJ 66 where Suffian LP said at p. 70:

> A person thought to be in unlawful possession of firearms may be charged under the Arms Act (Act 21 of 1960), for which the maximum penalty is seven years, or under the Firearms (Increased Penalties) Act (Act 37), for which the maximum penalty is 14 years, or under section 57 ISA, for which the penalty is death. It is argued that if three persons (say A, B and C) are thought to be in unlawful possession of firearms, to give the Attorney-General power to charge A under the first Act, B under the second and C under the third, would be in breach of article 8 of the constitution which guarantees equality before the law in the following words:
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> > All persons are equal before the law and entitled to the equal protection of the law.
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> and counsel cited the decision of Abdoolcader J in *Public Prosecutor v. Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116 in support, and submit that the decisions to the contrary of Ajaib Singh J in *Public Prosecutor v. Oh Keng Seng* [1976] 2 MLJ 125 and of Hashim Yeop A Sani J in *Public Prosecutor v. Su Liang Yu* [1976] 2 MLJ 128 were wrong.

> These three decisions were on the question whether or not the new section 418A of the Criminal Procedure Code was contrary to article 8 and therefore unconstitutional and *void,* and in considering the argument before us it is unnecessary for us to determine that question. Here we are asked to determine a different question, namely whether the Attorney-General may discriminate as between the three persons in the example given, or must he charge all three persons under the same statute. I am of the opinion that he may discriminate without contravening article 8.
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> A may have had a licence to possess his gun but delayed to renew it. It would have been proper for the Attorney-General to charge him simply under the Arms Act. B on the other hand never had a licence and has a criminal record. Must he also be charged under the Arms Act? I think that in today's conditions, when hardly a week goes by without some one being robbed by armed men, probably the Attorney-General would be accused of failing in his duty if he did not charge him under Act 37. C also may not have had a licence and may have had a very black record and have killed various people and terrorised witnesses so that few people are willing to come forward to report, let alone give evidence in open court against him. Should he also be charged only under the Arms Act simply because A is charged under that Act or under Act 37 like B or under ISA? I think that the choice is entirely the Attorney-General's.

All that equality before the law requires is that the cases of all potential defendants to criminal charges shall be given unbiased consideration by the prosecuting authority and that decisions whether or not to prosecute in a particular case for a particular offence should not be dictated by some irrelevant consideration (see *Teh Cheng Poh v. PP* [1979] 1 MLJ 50). Thus as Lord Diplock said in *Ong Ah Chuan v. PP* [1981] 1 MLJ 64 art. 8(1) of the constitution does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is some difference in the circumstances of the offence that has been committed. The decision to identify the difference in the circumstances of a particular case and to act accordingly is that of the attorney general pursuant to art. 145(3) of the constitution and is not subject to judicial review (see *Repco Holdings Bhd v. PP* [1997] 3 MLJ 681). In any event the exercise of the discretion by the attorney general to institute a prosecution against a person in a certain court, dependent on the circumstances of that case, may itself amount to a reasonable classification for the purposes of art. 8(1) of the constitution. Cases such as *Ramkrishna Dalmia v. Tendolkar* [1959] SCR 279, *Govindlalji v. State of Rajasthan* [1964] 1 SCR 561, *State of J & K v. Golam Md AIR* 1967 SC 122, *Birakishore v. State of Orissa* [1964] 7 SCR 32, *Mittal v. Union of India* AIR [1983] SC I and *Lachman v. State of Punjab* AIR [1963] SC 222 support the proposition that a classification may be

reasonable even though a single individual is treated as a class of himself, if there are some special circumstances or reasons applicable to him alone and not applicable to others. The objection grounded on art. 8(1) of the constitution cannot therefore be sustained. Perhaps the accused ought to have been more concerned with art. 5(1) of the constitution which reads as follows:

> No person shall be deprived of his life or personal liberty save in accordance with law.

The resultant matter for consideration is whether the attorney general is empowered by law to prosecute the accused in the Sessions Court as the offence with which he has been charged falls within the jurisdiction of the Magistrates' Court. That brings into immediate focus the submission advanced, based on art. 145(3A) of the constitution, that there is no specific provision of law in any statute which empowers the attorney general to institute a prosecution in a higher court when a lower court has the same jurisdiction. Article 145(3A) of the constitution reads as follows:

> Federal law may confer on the Attorney General power to determine the courts in which or the venue at which any proceedings which he has power under Clause (3) to institute shall be instituted or to which such proceedings shall be transferred.

This clause was added to the constitution by Act A704 and came into force on 10 June 1988. The object for the introduction of the clause can be discerned with ease from the speech of the Honourable Prime Minister in presenting the clause to Parliament, as found in the Penyata Rasmi Parlimen dated 17 March 1988, in the following words:

> Fasal (3) Perkara 145 memberi budi bicara kepada Peguam Negara untuk memulakan prosiding bagi sesuatu kesalahan. Dalam membuat sesuatu keputusan semasa menjalankan budibicaranya, Peguam Negara sewajarnyalah berpandukan kepada kenyataan-kenyataan yang dikemukakan kepadanya oleh pihak penyiasat. Mungkin dari kenyataan-kenyataan yang diterima, dan atas sebab-sebab tertentu, mungkin dari segi keselamatan, kerumitan kes, dan lain-lain lagi, sesuatu kes itu tidak sesuai dibicarakan di mahkamah rendah di sesuatu tempat tertentu. Untuk kepentingan keadilan, untuk menjamin agar kedua-dua pihak mendapat peluang yang sama untuk mengemukakan kes mereka sewajarnya, mungkin perlu memindahkan kes yang berkenaan dari Mahkamah Rendah ke Mahkamah Tinggi tanpa mengadakan penyiasatan awal atau preliminary enquiry.
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> Memandangkan keperluan tersebut, Parliamen telah mengkanunkan Akta Kanun Prosedur Jenayah (Pindaan dan Perluasan) 1976 yang menambahkan kepada Kanun Prosedur Jenayah satu seksyen baru, iaitu seksyen 418A.

Seksyen itu memberi kuasa kepada Pendakwa Raya untuk meminta mahkamah rendah memindahkan kes yang menunggu penyelesaian dihadapannya ke Mahkamah Tinggi di tempat yang ditetapkan oleh Pendakwa Raya, dan Mahkamah Rendah berkewajipan menghantar kes itu ke Mahkamah Tinggi yang ditetapkan itu tanpa mengadakan apa-apa penyiasatan awal.

Beberapa kes telah dipindahkan ke Mahkamah Tinggi dibawah seksyen itu. Dalam tahun 1976 seksyen itu telah dicabar dan Mahkamah Tinggi memutuskan seksyen itu tidak sah kerana bercanggah dengan Perlembagaan, tetapi Mahkamah Persekutuan, setelah mendengar rayuan terhadap keputusan itu, telah memutuskan seksyen itu adalah sah. Dalam tahun 1987 seksyen itu dicabar lagi atas alasan-alasan lain pula, dan kali ini Mahkamah Agung memutuskan bahawa seksyen itu tidak sah. Semua ini jelas menunjukkan terdapatnya ketidakpastian tentang sahnya seksyen itu.

Oleh itu, demi untuk membolehkan Peguam Negara menjalankan tugas-tugasnya sebagai Pendakwa Raya dengan tegas, adalah difikirkan perlu mengadakan peruntukan khusus dalam perlembagaan yang akan membolehkan peruntukan seperti seksyen 418A itu dibuat dalam undang-undang.

Untuk maksud itu, Fasal 10 Rang Undang-undang ini mencadangkan supaya dimasukkan ke dalam Perkara 145 Fasal baru (3A) yang membolehkan undang-undang Persekutuan memberi kuasa kepada Peguam Negara menentukan mahkamah-mahkamah di mana prosiding-prosiding yang Peguam Negara berkuasa memulakan akan diadakan atau kepada mana prosiding itu akan dipindahkan.

The clause was added to art. 145 of the constitution in order to validate, by way of re-enactment, s. 418A of the Criminal Procedure Code ("section 418A") which had been declared as unconstitutional by the (then) Supreme Court in *PP v. Dato' Yap Peng* [1987] 2 MLJ 311. It will be observed that s. 418A authorises the attorney general to institute or transfer to a named High Court any particular case triable by a criminal court subordinate to the High Court. Such institution or transfer may be beyond the local jurisdiction of a court where the particular offence was committed. As cases must be tried within the local jurisdiction of a court where an offence was committed s. 418A authorises the prosecution of such an offence outside the jurisdiction. In my opinion, therefore, art. 145(3A) of the constitution is designed to authorise the passing of laws to confer power on the attorney general to institute prosecutions in a court which he would otherwise be precluded from doing so. Section 418A is an illustration of such a law. However, no special law is required to enable the attorney general to institute a prosecution within the jurisdiction of a court where a particular offence was committed as it has already been provided for. There is no necessity for a law to be enacted to confer a power which

already exists. It follows that where the attorney general is already authorised to institute a prosecution for a particular offence in a particular court then art. 145(3A) of the constitution is inapplicable. No special law is therefore required if the prosecution of the accused in the Sessions Court is permitted by the existing laws which will now be considered.

The power of the attorney general to institute a prosecution is governed by art. 145(3) of the constitution which reads as follows:

> The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Shariah court, a native court or a court-martial.

The unfettered discretion of the attorney general to choose in which court, whether a higher or a lower court, to institute a prosecution was considered by the Federal Court in *PP v. Lim Shui Wang & Ors* [1979] 1 MLJ 65 where Suffian LP said at p. 67:

> In our view the words 'institute, conduct' in article 145(3) are wide enough to confer on the Attorney General unfettered discretion to choose in which court, a higher or lower court, to bring persons charged under section 39B(1)(a) of the Dangerous Drugs Ordinance, though of course he does not have or is it contended that he has, power to choose which particular judge or president should actually try the case. The word 'institute' means to set on foot, initiate, start, so that the Attorney General has power, at his discretion, to initiate a case such as the present ones, before a Special President or a High Court judge. We respectfully agree with Abdoolcader J when he said at page 119 in *Public Prosecutor v. Datuk Harun bin Haji Idris* (1976) 2 MLJ 116,
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> > "Institute" in article 145(3) … must necessarily refer to the commencement of proceedings and prosecutions … . It may well be … that the Public Prosecutor has power … to direct any case triable in the Magistrate's or Sessions Court to be tried in the High Court after a preliminary enquiry. This power to so direct would, if exercised, fall squarely within his discretion to institute and conduct criminal prosecutions and proceedings.

In commenting on the above passage ("the passage") Mr Manjeet Singh Dhillon said that its meaning is limited to the Dangerous Drugs Ordinance ("the ordinance") where there was (then) an option of a punishment of death or life imprisonment. He said that it is only in such cases that the attorney general can choose the forum dependent upon the penalty that he is seeking from the "dual level" punishment provided in the ordinance. He added that as there is no such "dual level" punishment in s. 506 of the Penal Code the effect of the passage referred to above is limited to the

facts of that case. It is my misfortune to say that this submission stems from a misunderstanding of the manner of ascertaining the *ratio decidendi* of a case which, as Professor Cross said, is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him. The rule of law treated by the Federal Court in the passage as a necessary step in reaching the conclusion is that in accordance with art. 145(3) of the constitution the attorney general has a discretion to choose in which court, whether a higher or lower court, to institute a prosecution when both the courts have jurisdiction to hear a case. This is made abundantly clear in the second sentence in the passage which, in dealing with the meaning of the word "institute", goes on to say in general terms that the attorney general has power "…to initiate a case such as the present ones…" before a Special President or a High Court. The words that I have emphasised show that the case considered by the Federal Court is only an illustration of the discretion of the attorney general. The ruling made by the Federal Court in the passage is therefore an application of the general principle to an offence under s. 39B(1)(a) of the ordinance. The *ratio decidendi* of the ruling made by the Federal Court is that where a case falls within the jurisdiction of two courts then art. 145(3) of the constitution authorises the attorney general to choose the forum where he desires to initiate a prosecution.

It is superfluous to state that the discretion of the attorney general to choose a higher forum for the trial of a particular case is subject to the prerequisite of the forum having jurisdiction to try the case. Before considering the legality of the prosecution of the accused in the Sessions Court it is first necessary to refer to the criminal jurisdiction of the subordinate courts as provided by the act. The relevant provisions are as follows:

Sessions Court

Section 63

A Sessions Court shall have jurisdiction to try all offences other than offences punishable with death.

Section 64

A Sessions Court may pass any sentence allowed by law other than the sentence of death.

Magistrates' Court

Section 85

Subject to limitations contained in this act a First Class Magistrate shall have jurisdiction to try all offences for which the maximum term of imprisonment provided by law does not exceed ten years imprisonment or which are punishable with fine only and offences under ss. 392 and 457 of the Penal Code.

Section 87

(1) A First Class Magistrate may pass any sentence allowed by law not exceeding -

(a) five years' imprisonment;
(b) a fine of ten thousand ringgit;
(c) whipping up to twelve strokes; or
(d) any sentence consisting any of the sentences aforesaid:

Provided that where, by any law for the time being in force, jurisdiction is given to the court of any magistrate to award punishment for any offence in excess of the power prescribed by this section, a First Class Magistrate may notwithstanding anything herein contained award the full punishment authorised by that law.

(2) Notwithstanding sub-s. (1), where a First Class Magistrate has convicted any person and it appears that, by reason of any previous conviction or of his antecedents, a punishment in excess of that prescribed by sub-s. (1) should be awarded, then the First Class Magistrate may award the full punishment authorised by law for the offence of which the person has been convicted and shall record his reason for so doing.

Before deciding whether the jurisdiction conferred on the Magistrates' Court is exclusive to them it is necessary to bear in mind certain rules of construction in construing statutes that deal with the jurisdiction of courts. There is a rule of construction that the exclusion of jurisdiction of the courts is not to be readily inferred and that such exclusion must either be explicitly expressed or clearly implied (see *Secretary of State v. Mask & Co* AIR [1940] PC 105). This rule of construction is not limited to civil courts alone, but applies to all courts of general application including criminal courts (see *Bhimsen v. State of UP* AIR [1955] SC 435, *State of West Bengal v. Anwar Ali* AIR [1952] SC 75, *State of MP v. Rameshwar Rathod* AIR [1990] SC 1849). It is a principle by no means to be whittled down and has been referred to as a "fundamental rule" (see *Pyx Granite Co Ltd v. Ministry of Housing and Local Government & Ors* [1959] 3 All ER 1). Thus the provisions of the Act which deal with the jurisdiction of the Sessions and Magistrates' Courts can be construed as being exclusive to

the respective courts only if there are clear words to that effect. If s. 63 of the Act, which deals with the jurisdiction of Sessions Courts, is to be construed as exclusive then s. 85 of the Act, which deals with the jurisdiction of Magistrates' Courts will be rendered otiose. If s. 63 of the Act is to be construed as excluding from its ambit the jurisdiction conferred on Magistrates' Courts by s. 85 of the Act then it would offend the clear and explicit language employed in the former. If that in fact was intended by s. 85 of the Act then the legislature would have used words like "only" or some other expressions like "to the exclusion of any other court" in the section as explained by the (then) Supreme Court in *Bank Negara Malaysia v. Gerald Glesphy & Ors* [1992] 1 MLJ 151 with regard to a similarly worded legislation. In my opinion the interpretation to be accorded to both the provisions is made clear by the opening words of s. 85 of the Act "Subject to limitations contained in this Act… . These words mean, quite apart from the meaning attached to them in *Lee Heng Kooi v. PP* [1993] 1 MLJ 69, that the jurisdiction of Magistrates' Courts is subject to restrictions or qualifications of their jurisdiction contained in other provisions in the Act. That includes a reference to s. 63 of the Act as it is wide enough to include the jurisdiction of the Magistrates' Courts. This means that the jurisdiction conferred on the Magistrates' Courts is not exclusive. It is subject to the overriding jurisdiction of the Sessions Courts as recognised by s. 85 of the Act. The result is that s. 85 of the Act does not oust the jurisdiction of the Sessions Court in respect of offences falling within the jurisdiction of the Magistrates' Court. The words "shall have jurisdiction" in both ss. 63 and 85 of the Act mean that when a case is filed in either of the courts it is imperative for them to exercise the jurisdiction (see *PP v. Chang Han Yuan* [1999] 4 MLJ 49). It follows that when a case falling within the jurisdiction of the Magistrates' Court is filed in the Sessions Court the court cannot decline to exercise the jurisdiction. It is perhaps necessary for me to refer to s. 177 of the Criminal Procedure Code which provides, *inter alia*, that a magistrate shall transfer a case to a higher court if application is made to that effect by the public prosecutor before or during the trial of a case. It will be observed that the section is only applicable to a prosecution that has already been instituted and would therefore be of use if facts emerge subsequently to warrant the transfer of the case to a higher court. If a case can be transferred to a higher court after it has been registered in the lower court I do not see any objection to it being directly registered in the higher court based on facts in the possession of the prosecution at that stage rather than achieving the same result through a circuitous route. I pause to add that even if an order is made transferring this case to the Magistrates' Court there is nothing to prevent the attorney general from requiring the

case to be transferred to the Sessions Court. The right of the attorney general to require a case pending in a lower court to be transferred to a higher court means that an accused is not prejudiced if it is filed directly in the higher court. Thus there is no difference in law if a prosecution is initiated in a higher court from the very beginning. There is therefore nothing unusual or sinister in the attorney general filing a case in a higher court when it comes within the ordinary jurisdiction of a lower court as it is permissible in law. This rule is applicable even to civil claims. In *Bank Negara Malaysia v. Gerald Glesphy & Ors* [1992] 1 MLJ 151 the (then) Supreme Court observed that the unlimited jurisdiction of the High Court to hear civil claims includes claims that may be made in the Sessions Court and the Magistrates' Courts. A civil case that is ordinarily within the jurisdiction of the Magistrates' Court may also be filed and heard in the Sessions Court. As Mohd Hishamudin J said in *Kee Chai Heng v. Ketua Polis Daerah Kuala Muda* [1999] 2 MLJ 668 at p. 671:

> The sessions court should proceed with the trial of the case before it. After all, the sessions court is competent to hear such cases: as a general rule, what is within the civil jurisdiction of the magistrate's court is also within the jurisdiction of the sessions court.

The relevant provisions of law that I have adverted to authorise the attorney general to institute a prosecution in any court that has jurisdiction to hear it, be it a higher or a lower court. This may be done even independently of the discretion vested in the attorney general by art. 145(3) of the Federal Constitution.

The filing of a case that falls within the jurisdiction of the Magistrates' Court in the Sessions Court may be desirable where, for example, the sentence that the prosecution seeks in a particular case is beyond the jurisdiction of the Magistrates' Court. This is explained in *PP v. Tengku Hitam* [1962] MLJ 414 where Hashim J said at p. 415:

> Before a case is presented in court the prosecution must first satisfy itself whether the maximum punishment which such court can impose is adequate. If it thinks that such sentence is inadequate the case should be brought before another court. Ordinarily a case should be brought before the court which has jurisdiction to try it. For example, a case which is ordinarily triable in a Magistrate's Court should be brought in that court and should only be brought in the Sessions Court if the prosecution is of the opinion that upon conviction the maximum sentence which can be imposed by the Magistrate is inadequate. The provisions of section 87(2) of the Courts Ordinance 1948

should only be invoked when the case takes an unexpected turn and the evidence so adduced shows that the maximum sentence that can be imposed by the trial Magistrate is inadequate.

I must add that s. 87(2) of the Act is restricted in its application to the previous convictions and antecedents of an accused. It does not cater for the facts of the case itself which may warrant the full punishment prescribed by law.

In this case the maximum penalty provided by the second limb of s. 506 of the Penal Code, being seven years imprisonment, falls within the jurisdiction of the Sessions Court and the Magistrates' Court. The attorney general may therefore elect in which court to institute the prosecution. The filing of the case in the Sessions Court is therefore correct in law. In the premises the stand taken by the learned Sessions Court judge is lawful and I direct that the case be proceeded with in the Sessions Court without any further delay.